STATE OF MICHIGAN

COURT OF APPEALS

ROBERT MARTIN KANIA,

Plaintiff-Appellee,

v

GREGORY M. WROBLESKI,

Defendant-Appellant.

UNPUBLISHED
September 20, 2007

No. 271232
Wayne Circuit Court
LC No. 05-516416-NO

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order denying his motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff fell off a stepladder while assisting in the erection of a detached garage on defendant's premises. Plaintiff claimed that the ladder was defective and that defendant was aware of the defect and of the ladder's instability, but failed to warn him. Plaintiff sought recovery under theories of premises liability and ordinary negligence.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that (1) the allegedly defective ladder was not a "condition on the land" for purposes of a premises liability claim; (2) under the simple tool doctrine, defendant owed no duty to inspect the ladder; (3) if there was a dent in the ladder before the accident, there was no reason it could not have been observed by plaintiff and, therefore, defendant owed a duty of care only if he knew or should have known that plaintiff would not discover the unstable nature of the ladder on his own. In plaintiff's response to defendant's motion, plaintiff requested that the court grant summary disposition in his favor. In his deposition and affidavit, plaintiff asserted that defendant acknowledged that he was aware of the unsafe condition of the ladder and purchased new ladders for the construction project. The trial court declined to grant summary disposition to either party. The court explained that it was denying defendant's motion because of evidence that defendant was aware that the ladder was defective.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Defendant relies on *Muscat v Khalil*, 150 Mich App 114, 126; 388 NW2d 267 (1986), for the proposition that the ladder could not constitute a "condition on the land" for purposes of the premises liability claim. However, as this Court observed in *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995), a premises liability action may be founded on an allegedly defective ladder used on the premises. The Court in *Eason* explained that the duty owed to an invitee[1] "extends to instrumentalities on the premises that the invitee uses at the invitation of the premises owner." *Id.* Defendant also cites *Berry v J & D Auto Dismantlers, Inc*, 195 Mich App 476, 480-481; 491 NW2d 585 (1992), but that decision does not support his argument. In *Berry*, the Court did not reject the proposition that an unsafe instrumentality may form the basis of a premises liability claim; it explained that to the extent that a hazard on the property existed in that case, it was the plaintiff's *use* of the instrumentality (bumper jacks), rather than the jacks themselves, that created the hazard. *Id*.

Defendant also argues that the simple tool doctrine bars plaintiff's cause of action. The doctrine on which defendant relies is not the one applicable to products liability claims brought against manufacturers or sellers. See, e.g., *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 389-390; 491 NW2d 208 (1992). Rather, defendant's citations to *Pawlowski v Van Pamel*, 368 Mich 513; 118 NW2d 395 (1962), and *Rule v Giuglio*, 304 Mich 73; 7 NW2d 227 (1942), indicate that he is referring to the simple tool doctrine that addresses an employer's duty to its employees.

> The simple-tool doctrine is an exception to the employer's duty to furnish his servant with reasonably safe machinery to perform the required work. *Sheltrown v Michigan Central R Co*, 245 Mich 58; 222 NW 163 (1928). The Court in *Sheltrown* held that a master is "under no obligation to his servants to inspect during their use those common tools and appliances with which everyone is familiar * * *." *Id.*, 63. The master's nonliability under the simple-tool exception rests upon the assumption that the employee is in the same, if not superior, position to observe the defect as the employer. *Id*., 64. [*Cressman v Wright*, 105 Mich App 194, 198; 306 NW2d 447 (1981).]

The trial court did not refer to the simple tool doctrine in its ruling, but rather found that defendant was not entitled to summary disposition because there was evidence that he was aware that the ladder was defective.

The simple tool doctrine is premised on the fact that the employee's familiarity with the common tool requires no instruction from the employer particularly where the employee would readily recognize any defect. See *Cressman, supra*. In *Pawlowski* and *Rule*, both employees were familiar with the ladder at issue because it was utilized before the injury occurred. In the present case, plaintiff was not defendant's employee and had never utilized the ladder before the fall. Assuming arguendo that for purposes of the application of the rule, defendant is comparable to an employer and plaintiff, an employee, there is support for the trial court's ruling that

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[1] Defendant does not dispute plaintiff's status as an invitee for purposes of the motion and this appeal.

defendant's knowledge of a defect in the ladder and its instability precludes application of the simple tool doctrine. See 27 Am Jur 2d, Employment Relationship, § 231, p 720; *Philip Carey Roofing & Mfg Co v Black*, 129 Tenn 30; 164 SW 1183, 1184-1185 (1914) ("The foundation of the simple tool doctrine is the assumption that the knowledge of the master and servant must be equal. Such a presumption cannot be indulged where the master has actual notice of a defect, where the proof shows his knowledge is superior.") In the present case, plaintiff presented documentary evidence indicating that defendant was aware of the defect in this particular ladder and it precipitated his purchase of two other ladders to use in the construction of the garage. However, he allegedly did not warn anyone of the defect in the ladder at issue or remove it from the premises. Moreover, defendant does not address the basis for the trial court's decision. Defendant's failure to address this necessary issue precludes appellate relief. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (appellate relief is precluded where the appellant fails to address the basis of the trial court's decision).

Defendant further argues that he had no duty to plaintiff unless he knew or should have known that plaintiff would not discover the unstable nature of the ladder on his own and that there is no evidence to support such a finding. Defendant seems to be relying on the open and obvious doctrine, although he does not specifically name it as such.

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (citation omitted). The duty generally does not encompass warning about or removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Id*. at 517. Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The determination depends on the characteristics of a reasonably prudent person, and not on the characteristics of a particular plaintiff. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004).

The record does not establish that the risk and hazard posed by the ladder would have been apparent to an average person on casual inspection. Plaintiff's testimony suggests that an ordinary person of average intelligence would not have discovered the instability. He indicated that after he set up the ladder, it looked secure and appeared to be stable. There is no evidence to the contrary. Although the determination whether a hazard is open and obvious depends on the characteristics of a reasonably prudent person, and not on the characteristics of a particular plaintiff, *Mann, supra*, there is no evidence suggesting that an average person would have observed the instability that plaintiff, who was experienced in construction, did not detect.

Defendant's brief also suggests that he is challenging plaintiff's ability to establish causation. These arguments are unpreserved because they were not raised before the trial court. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). This Court properly may review an issue if the question is one of law and the facts necessary for its resolution have been presented. *Id*. at 98-99. The issues here, however, concern factual matters, not legal issues. Inasmuch as the causation arguments were not raised and supported in

defendant's motion for summary disposition, plaintiff had no obligation to present evidence showing a causal link between the condition of the ladder and his fall. MCR 2.116(G)(5); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In any event, plaintiff presented evidence that the ladder was damaged before the accident and that defendant stated that the damage (a crimp or dent in one of the legs) made the ladder shaky and unstable. Under the circumstances, the trial court did not err in denying the defense motion for summary disposition.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood